No. 20359

In the

United States Court of Appeals

For the Ninth Circuit

ARNOLD A. SMITH and RACHAEL SMITH, his wife; and HERBERT SMITH and EVELYN SMITH, his wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Arizona

Honorable WALTER E. CRAIG, District Judge

Appellants' Opening Brief

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SUBJECT INDEX

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Appellants' Opening Brief

Appellants were plaintiffs in the District Court and appellee was the defendant. For convenience and uniformity, the parties will be referred to in this brief as they were in the lower court. The transcript of record will be designated as "T.R." followed by the page number.

JURISDICTION

The District Court took original jurisdiction of this case under the Tucker Act, 28 U.S.C. § 1346 (a) (2), which provides in part as follows:

"§ 1346. United States as defendant

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * * * * *

"(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

In plaintiffs' Amended Complaint,[1] they alleged that the United States had taken property belonging to them without due process of law and without just compensation, in violation of the Fifth Amendment to the United States Constitution, and/or that the United States breached an implied contract with plaintiffs, damaging plaintiffs in the sum of $7,470.00. (T.R. 8-11)

Judgment dismissing plaintiffs' Amended Complaint (for failure to state a claim) was entered by the District Court on August 3, 1965, and Notice of Appeal was filed within thirty days thereafter. (T.R. 24, 26, 31) This Court has jurisdiction to review the Judgment of the District Court under the provisions of 28 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE

This appeal is from the Judgment of the District Court dismissing plaintiffs' Amended Complaint for failure to state a claim upon which relief could be granted. The decision of the District Court with respect to the Amended Complaint (T.R. 20-23) adheres to its earlier decision on the original Complaint (T.R. 5-7) reported as *Smith v. United States,* 243 F. Supp. 222, 15 Am. Fed. Tax R.2d 1262 (D.C. Ariz. 1965).

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1. Set forth verbatim in the Appendix to this brief.

In their Amended Complaint plaintiffs allege as follows:

On May 8, 1964, and prior thereto, plaintiffs were the owners of certain real property located in Phoenix, Arizona, consisting of land, a warehouse and office building, which they had leased to Lichty Printing and Business Forms, Inc. for a rental of $1,350.00 per month or $45.00 per day (T.R. 9). On May 8, 1964, the defendant, through its agents, employees of the Internal Revenue Service, levied upon and seized the property of plaintiffs' tenant, Lichty Printing and Business Forms, Inc., for non-payment of taxes owed by Lichty to defendant. (T.R. 9-10)

The property thus levied upon and seized was located upon the leased premises and, in effecting the seizure, the employees of the Internal Revenue Service took possession of and occupied the premises by padlocking them. (T.R. 9-10) On that same day, May 8, 1964, plaintiffs advised defendant that plaintiffs were the owners of the premises and demanded possession of the premises from defendant. (T.R. 10) Plaintiffs further advised defendant that they would look to defendant for payment of the rent so long as defendant occupied and used the premises. (T.R. 10) Defendant continued to occupy and use plaintiffs' property for approximately five and one-half months, until October 21, 1964, at which time the property was returned to plaintiffs. (T.R. 10)

At the time of the seizure and taking of the premises by the defendant, the lessee, Lichty Printing and Business Forms, Inc., was in default under its lease in the payment to plaintiffs of rent owed for a number of months. By reason of this default, the plaintiffs were entitled to possession of the leased premises under the provisions of the lease (T.R. 16-17), and also under Section 33-361, Arizona Revised Statutes 1956. (T.R. 9)

Based upon the facts and events recited above, plaintiffs alleged that the defendant became obligated upon a contract implied in fact to pay to plaintiffs the sum of $7,470.00 as rent for plaintiffs' property during the five and one-half months defendant occupied and used the premises. (T.R. 10) In the alternative, plaintiffs alleged that the defendant, through the acts of its agents, took private property of the plaintiffs for public use without due process of law and just compensation in violation of plaintiffs' rights under the Fifth Amendment to the United States Constitution, and that plaintiffs were thus damaged in the sum of $7,470.00. (T.R. 10)

Defendant moved to dismiss the Amended Complaint for the reason that it failed to state a claim upon which relief could be granted. (T.R. 12) The motion was granted by decision and order of the District Court entered July 29, 1965. (T.R. 20-23) Judgment of dismissal was entered August 3, 1965 (T.R. 24), and followed by the Notice of Appeal filed August 4, 1965. (T.R. 26)

The question presented to this Court is whether or not the United States is liable to a landlord when it takes, occupies and uses the landlord's premises as a result of seizure of a tenant's property located on the premises by padlocking those premises and occupying and using the premises for storage of the seized property, and when, at the time of seizure, the landlord is entitled to remove the tenant and take possession of the property.

SPECIFICATION OF ERRORS

1. The District Court erred in dismissing plaintiffs' Amended Complaint for the reason that the allegations therein do state a claim upon which relief can be granted upon the theory of contract implied in fact for payment

of rent, as well as upon the theory of a taking of private property for public use without due process of law and just compensation in violation of the Fifth Amendment to the Constitution of the United States.

2. The District Court erred in holding that there is no right to possession of property unless the right has been exercised.

SUMMARY OF ARGUMENT

1. Under plaintiffs' lease, as well as under the law of Arizona, plaintiffs were entitled to possession of their property on May 8, 1964, because their tenant had failed to pay the agreed rent.

2. When, on May 8, 1964, the employees of the Internal Revenue Service padlocked the premises, they deprived plaintiffs of the right to possession.

3. The right to possession of property is not determined by actual possession.

4. When plaintiffs' demand for possession was refused, and the property was occupied by the Internal Revenue Service for five and one-half months, the United States impliedly agreed to pay plaintiffs the rental value of the property, and/or plaintiffs' property was taken without due process of law and just compensation.

5. Plaintiffs' Amended Complaint did state a claim for relief and should be reinstated.

ARGUMENT

I. Plaintiffs' Amended Complaint States a Claim for Relief on the Theory of an Implied Contract for Payment of Rent.

> "Where private property is taken by the government for public use, a contract to pay for it will ordinarily be implied, even though the government subsequently denies its liability to make compensation . . ." 91 C.J.S., *United States* § 89b, p. 172.

The foregoing principle of law has been cited in numerous cases. One of the earliest cases involving a temporary taking of property by the federal government is *Johnson v. United States,* 2 Ct. Cl. 391 (1866), in which the United States was held liable for the rental value of land taken for military purposes as though it had occupied the property under an implied lease. In that case the court stated it would assume that at the time of entry upon the premises the property owner was willing to lease and the government was willing to rent the premises at the fair or market value of an annual rent. See also a subsequent decision involving the same parties which adhered to the principle stated in the first decision, *Johnson v. United States,* 4 Ct. Cl. 248 (1868).

In its order of April 6, 1965, dismissing plaintiffs' original Complaint, which was adhered to in its subsequent order of July 29, 1965, the District Court stated that in order to maintain an action based on implied contract under the Tucker Act:

> "[T]he action must be based upon a contract implied in fact as distinguished from a contract implied in law, or founded upon equitable principles. *United States v. Minnesota Mutual Investment Co.,* 271 U.S. 212. In order to maintain such an action based upon an implied contract, the facts must indicate some understanding between the parties with regard to the rental of or use of the property in question, although the complete terms of the agreement may not necessarily have been expressed . . ." (T.R. 6) See also 243 F. Supp. at 224.

Plaintiffs alleged that they were owners of the property and entitled to possession thereof at the time defendant padlocked the premises. Plaintiffs demanded possession of the premises and advised defendant that they would look to defendant for payment of rent in the sum of $45.00

per day so long as defendant occupied the premises. In response, defendant continued to use and occupy the premises for approximately five and one-half months. It is submitted that the conduct of the parties imply in fact the existence of an agreement to pay rent for the use of plaintiffs' premises.

The facts in *Hirsch v. United States,* 120 F. Supp. 808 (D.C.E.D.N.Y. 1954) are quite similar to the case at hand. In that case the plaintiffs as owners of rented premises brought an action under the Tucker Act (Title 28, U.S.C. § 1346(a)(2)), alleging that the District Director of Internal Revenue took possession of their premises by levying upon and seizing property belonging to the plaintiffs' tenant, who was a delinquent taxpayer. After taking possession of the premises, the government occupied them for a period of time. The plaintiffs alleged in their complaint that an implied contract arose between them and the District Director for the use and occupation of the premises. As in this case the defendant, prior to answer, moved to dismiss plaintiffs' complaint. In denying defendant's motion the court said:

> "I do not believe that these contentions are well founded. Section 1346(a)(2) of Title 28 specifically permits suits against the Government on an implied contract with the United States. The amended complaint alleges an implied contract between the plaintiffs and the District Director arising out of his use and occupancy of the plaintiffs' property for the period in question. In my opinion the cause of action asserted in the amended complaint is such a claim as was contemplated by section 1346(a)(2) of Title 28, U.S.C." 120 F. Supp. at 809.[2]

2. It should be noted that in a subsequent opinion in this case, *Hirsch v. United States,* 170 F. Supp. 229 (D.C.E.D.N.Y. 1959), which was written by a different district judge, the court held contrary to plaintiffs' position on the merits.

A very recent decision in which the facts are almost identical to this case is *Maryland National Bank v. United States*, 227 F. Supp. 504 (D.C. Md. 1964). In that case a lease between the lessee-taxpayer and the plaintiffs-landlords was in effect when the assets of the taxpayer were seized and the premises padlocked and notices of government seizure were placed on the outside of the building by agents of the Internal Revenue Service. Plaintiffs notified the District Director that they would hold the United States accountable for any rent for the premises which accrued while the government occupied them. Plaintiffs then brought suit under the Tucker Act for damages for the government's occupancy, alleging express contract, implied contract and a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The court did not discuss the ground of express contract since it found for the plaintiffs on the basis of the other theories. After discussing the difference between contracts implied in law and those implied in fact, the court said:

> "It is clear from the evidence that the plaintiffs did not dispute the government's seizure of the premises. But, they did make it known that they would look to the United States for any unpaid rent which accrued while the property was under government control. *The intent on the part of the plaintiffs to obligate the premises and to place an obligation on the government is clear.*
>
> * * * * * * *
>
> *"The intent of the government to obligate itself may be implied from other provisions of the regulations.* Feldwin Realty Co. v. United States, 169 F. Supp. 73 (D.N.J. 1959) commented upon in 9 Mertens, Law of Federal Income Taxation, § 49.191 (1963 Supp.). These

regulations provide that the United States shall pay for the expenses of the levy from the proceeds of the sale. Certainly, rentals for storage space for property seized is a bona fide expense of the levy.

"The court therefore finds an intent on the part of both parties to obligate themselves, and a contractual relationship, implied in fact, between them." (Emphasis added) 227 F. Supp. at 507-08.

The government's conduct in this case, in the face of plaintiffs' demand either for possession of their property or the payment of rent, clearly gives rise to the implication that the government agreed to pay rent.

II. Plaintiffs' Amended Complaint States a Claim for Relief on the Theory of Inverse Condemnation or a Taking of Private Property Without Due Process of Law and Just Compensation.

While many courts use the vehicle of implied contract to find liability on the part of the government and assess damages for the temporary taking of private property and treat it as a separate legal theory, it is clear that the ultimate basis for liability is the prohibition against the taking of private property without just compensation found in the Fifth Amendment to the Constitution of the United States.

In *Etheridge v. United States*, 218 F. Supp. 809 (D.C. E.D.N.C. 1963), the court held that:

"When the United States occupies the premises of another it becomes liable for the rental value even though the property is occupied without any intention on the part of the United States to pay rent. In Niagara Falls Bridge Commission v. United States, 76 F. Supp. 1018, 1019 (111 Ct. Cl. 338, 1948) and cases cited, the Court said, 'This liability arises under the Fifth Amendment prohibiting the taking of private property without the payment of just compensation.'" 218 F. Supp. at 813.

The facts alleged in plaintiffs' Amended Complaint establish an "inverse or reverse condemnation" as that term has been defined by this Court in *State of California v. United States District Court,* 213 F.2d 818 (9th Cir. 1954):

> "The term 'inverse or reverse condemnation' contemplates the situation in which property has been taken by the exercise of the power of eminent domain, but without any payment of compensation therefor having been made. The theory upon which such an action is brought is that since a taking, which is otherwise lawful, would be a violation of due process of law if done without compensation, it must be presumed that the taker intends to pay for the property condemned. See Peckwith v. Lavezzola, 1942, 50 Cal.App.2d 211, 122 P.2d 678, 682 . . ." 213 F.2d at 821, n. 10.

In *Maryland National Bank v. United States, supra,* 227 F. Supp. 504, in which, as previously pointed out, the facts are almost identical to the facts in this case, after allowing the landlord to recover on the implied contract theory, the court further decided that the landlord could also recover for a taking of property in violation of the Fifth Amendment. In quoting the United States Supreme Court, the decision states:

> "It is apparent that even had the argument of implied-in-fact contract failed, a further ground for recovery under the Tucker Act, namely a taking of property without due process of law in violation of the fifth amendment to the Constitution, avails itself to the plaintiffs. As was said by Mr. Justice Frankfurter in United States v. Dickinson, 331 U.S. 745, 748, 67 S.Ct. 1382, 1384, 91 L.Ed. 1789, 1793 (1947):
>
> > "'But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution,

> or that there was an implied promise by the Government to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation."'

> "The United States argues that no taking of property existed here and that no demand was made upon it to release the premises. The Dickinson case, 331 U.S. at page 748, 67 S.Ct. at page 1385, 91 L.Ed. 1789, said:
>
> "'Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.'

> "The government put its lock on the premises and placed notices on the outer walls telling of the seizure. These facts convince the court that a taking took place [see Feldwin Realty Co. v. United States, supra, 169 F. Supp., p. 77], notwithstanding the lack of demand by the plaintiffs to vacate or the possibility that the government would have vacated upon request." 227 F. Supp. at 508.

It should be noted that in this case plaintiffs demanded that defendant vacate the premises and defendant refused.

In *Feldwin Realty Co. v. United States,* 169 F. Supp. 73 (D.C.N.J. 1959), adhered to on rehearing, 179 F. Supp. 70 (D.C.N.J. 1959), the court held that where the government levied on property of a tenant of a landowner and stored property on the owner's premises and padlocked the same, there arose in favor of the landowner against the government an action based upon implied contract and an action based upon the constitutional provision that private property shall not be taken for public use without just compensation.

In *United States v. Caruso,* 3 Am. Fed. Tax R. 2d 515 (D.C.W.D. Pa. 1958), the court stated that since the tenant's property held under distraint by the government was stored on the landlord's premises, the landlord should be compensated for use of her premises and the court awarded a sum for this rental and ordered it paid as a part of the costs of the sale.

In *Carroll v. United States,* 229 F. Supp. 891 (D.C.W.D. Ark. 1964), where the plaintiff sued for reasonable value for use of premises, the court held that where the United States, on the basis of a Small Business Administration mortgage on lessee's cafeteria equipment which had been abondoned by lessee's bankruptcy trustee, had exclusive dominion and control of such equipment but did not remove it, lessors were deprived of their property and the United States was liable on implied contract for reasonable rental. See also *Buffalo & Fort Erie Public Bridge Authority v. United States,* 65 F. Supp. 476, 106 Ct. Cl. 731 (1946), and *Niagara Falls Bridge Commission v. United States,* 76 F. Supp. 1018, 111 Ct. Cl. 338 (1948).

In its orders of April 6, 1965, and July 29, 1965, the District Court held that since plaintiffs had not *exercised* their right to possession of the property, and the tenant was still in possession at the time of seizure by the government, there was no taking of property from plaintiffs. (T.R. 7, 22-23)

It would appear that the District Court confused actual possession with the right to possession. In 2 Nichols, *Eminent Domain* § 5.22[2], p. 46, it is stated that:

> "Possession is not necessary to the maintenance of proceeding to enforce the constitutional right of compensation for the taking of property by eminent domain, and when the premises taken are in the possession of tenants for life or years, the remainderman or rever-

sioner must be compensated for the destruction of his interest . . ." (See also *Alexander v. United States,* 39 Ct. Cl. 383 (1904); *Stubbs v. United States,* 21 F. Supp. 1007 (D.C.M.D.N.C. 1938); and other numerous authorities cited in the footnotes to the above quotation.)

The tenant, Lichty Printing and Business Forms, Inc., was in arrears in the payment of rent on the date of the seizure and taking of the premises and therefore under both the default clause of the lease and state law the plaintiffs had the *right to enter and take possession of the premises.* The pertinent portion of the lease between plaintiffs and their tenant provides:

> "DEFAULT: It is specifically understood and agreed that should the lessee fail to pay any installments of rent herein agreed to be paid, . . . the lessors may, at their option, declare this lease to an end, and cancel the same, and enter and take possession of the premises, . . ." (T.R. 16-17)

Section 33-361, Arizona Revised Statutes 1956, provides in part:

> "A. When a tenant neglects or refuses to pay rent when due and in arrears for five days, or when tenant violates any provision of the lease, the landlord or person to whom the rent is due, or his agent, may reenter and take possession, . . ."

Plaintiffs concede that they had as yet taken no steps to dispossess their tenant and actually take possession prior to the levy and seizure by the United States. This did not alter the fact that plaintiffs had the right to retake possession of their property at any time. Lichty Printing was a tenant by sufferance and did not own any interest in the property. 2 Nichols, *Eminent Domain,* § 5.23[6], p. 73. How-

ever, once the defendant had levied upon and seized the tenant's property and padlocked the premises, thereby also seizing and taking the premises, plaintiffs' right to re-enter and take possesson of the premises had been terminated. Plaintiffs could not break the government's padlock and enter and take possession of the premises without incurring both civil and criminal liability.

If, as the District Court held (T.R. 23), the defendant took only what the tenant was entitled to under the law, then the defendant took only the right to possession at the sufferance of plaintiffs. This right ended when plaintiffs demanded possession of their property. If the reasoning of the District Court were carried to its logical conclusion, plaintiffs would have no right to compensation if Lichty Printing had been a trespasser, because the trespasser was in actual possession of the property. Clearly, this would be erroneous. The mere fact that the right to possession of property is as yet unexercised does not preclude its existence.

There can be no doubt that a temporary taking of property entitles the owner to just compensation. As the late Justice Frankfurter stated in *United States v. Dickinson,* 331 U.S. 745, 67 Sup. Ct. 1382, 91 L.Ed. 1789 (1947):

> "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time . . ." 331 U.S. at 748.

In *Dickinson* the Supreme Court held that a taking had occurred and allowed the plaintiffs to recover just compensation for land intermittently flooded by waters impounded by a dam constructed by the United States and for erosion caused by such waters.

In *United States v. General Motors Corp.*, 323 U.S. 373, 65 Sup.Ct. 357, 89 L.Ed. 311 (1945), the Supreme Court discussed the taking of a temporary occupancy from a long-term lessee of premises and held that the just compensation to be paid is the value of the interest taken. In that case the occupancy taken by the United States was originally one year. In the case at hand, the occupancy taken by the United States was five and one-half months. The elements and measure of damages as just compensation for temporary use and occupancy are discussed at length in *Annot.*, 7 A.L.R.2d 1297.

In 2 Nichols, *Eminent Domain* § 6.1[1], pp. 367-372, taking of property is discussed as follows:

> "It is well settled that a taking of property within the meaning of the constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, which right or privilege is destroyed, injured or abridged by such appropriation."

Defendant lawfully levied upon and seized property belonging to the delinquent taxpayer, Lichty Printing and Business Forms, Inc., who was plaintiffs' tenant. But the federal government cannot be allowed to seize that property on rented premises and thereafter occupy and use the landlord's premises without paying for them. This action deprives the landlord of his property. He is deprived of his right to enter and take possession of the premises and rent the premises to someone else or to otherwise use them as he wishes. Such action on the part of the United States is in direct violation of the prohibition of the Fifth Amendment to the Constitution of the United States:

". . . nor shall any person . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

CONCLUSION

The law is clear that when the United States, through the acts of its agents in performing their official duties, occupies and uses private property or interferes with the owner's use and enjoyment of his property, it becomes liable to the owner. This liability on the part of the United States may be based either upon the theory of implied contract for payment of rent or the theory that there was a taking of private property under the Fifth Amendment to the United States Constitution, but under either theory the liability of the United States is ultimately based upon the constitutional prohibition that private property shall not be taken for public use without just compensation.

The truth of the well pleaded facts in plaintiffs' Amended Complaint was conceded for the purpose of defendant's motion to dismiss. *Interstate Nat. Gas. Co. v. Southern California Gas Co.,* 209 F.2d 380 (9th Cir. 1953). The facts pleaded establish that defendant took, occupied and used plaintiffs' premises for approximately five and one-half months, thereby depriving plaintiffs of the use and enjoyment of their premises, for which plaintiffs are entitled to compensation.

In *Conley v. Gibson,* 355 U.S. 41, 78 Sup.Ct. 99, 2 L.Ed. 2d 80 (1957), a unanimous Supreme Court speaking through Justice Black said:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 46-47.

In view of the foregoing, plaintiffs urge that the District Court erred in granting appellee's motion to dismiss, that the judgment should be reversed and that plaintiffs' Amended Complaint should be reinstated.

Respectfully submited,

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Attorneys for Appellants

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JARRIL F. KAPLAN

Attorney for Appellants

(Appendix Follows)

Appendix

In the United States District Court
for the District of Arizona

NO. CIV-5359-PHX

ARNOLD A. SMITH and RACHAEL SMITH, his wife, and HERBERT SMITH and EVELYN SMITH, his wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED COMPLAINT

For their claim against defendant, plaintiffs allege:

I.

This is an action for the recovery of $7,470.00 due to plaintiffs from defendant for the taking, use and occupancy of real property owned by plaintiffs and is brought under Title 28, United States Code, § 1346(a)(2).

II.

Plaintiffs now are, and for many years heretofore, have been residents and citizens of Phoenix, in Maricopa County, Arizona, within the territorial jurisdiction of this Court.

III.

Plaintiffs have a claim against the United States for compensation for value of property taken by the United States for public use, as hereinafter more particularly stated.

IV.

During May, 1964, and before and after that time, plaintiffs were, had been and still are the owners of real property consisting of land, a warehouse and office buildings located along the northeasterly portion of Lot 7, Block 4, Homestead Place, commonly known as 922 North 17th Avenue, Phoenix, Arizona, and situated in the City of Phoenix, County of Maricopa, State of Arizona.

V.

Until May 8, 1964, and prior thereto, plaintiffs had leased the premises described in paragraph IV above to Lichty Printing and Business Forms, Inc., an Arizona corporation, for rental of $1,350.00 per month or $45.00 per day. The lessee, Lichty Printing and Business Forms, Inc., was in default under said lease in the payment to plaintiffs of the rent owed for the premises for a number of months and, in May, 1964, there was considerable back rent due and owing by lessee to plaintiffs. By reason of such default, plaintiffs, on May 8, 1964, and thereafter, were entitled to possession of said premises under the provisions of the aforesaid lease and also under Section 33-361, Arizona Revised Statutes (1956).

VI.

On May 8, 1964, the defendant United States of America, through its agents, employees of the Internal Revenue Service, took possession of and occupied the premises de-

scribed above by padlocking the said premises and levying upon and seizing property of the lessee, Lichty Printing and Business Forms, Inc., situated on the leased premises, for taxes owed by lessee to defendant. On the same date, the plaintiffs demanded possession of the premises from defendant and advised defendant that plaintiffs were the owners of the premises and that plaintiffs would look to defendant for payment of the rent in the sum of $45.00 per day so long as defendant occupied and used said premises. Defendant continued to occupy and use plaintiffs' premises until October 21, 1964, at which time the said premises were returned to plaintiffs.

VII.

By its use and occupancy of plaintiffs' premises, the defendant United States of America became obligated to pay to the plaintiffs the sum of $7,470.00 as rent for said use and occupancy from May 8, 1964, to October 21, 1964. No part of said sum has been paid.

VIII.

In the alternative, plaintiffs allege that defendant, through the acts of its agents, took private property of the plaintiffs for public use without due process of law and just compensation in violation of plaintiffs' rights under the United States Constitution, Amendment V, in that defendant deprived plaintiffs of their right to re-enter their premises, dispossess the tenant and take possession of their premises; that said taking and use commenced May 8, 1964, and lasted until October 21, 1964; and that plaintiffs have been damaged thereby in the sum of $7,470.00.

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of $7,470.00 and for plaintiffs' costs of suit incurred herein.

MOORE, ROMLEY, KAPLAN, ROBBINS & GREEN

By /s/ CURTIS A. JENNINGS

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